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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
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10 **DARRYL DUNSMORE,**

11 Petitioner,

12 vs.

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14 **PARAMO, Warden,**

15 Respondent.

CASE NO. 13-CV-1193-GPC-(PCL)

**ORDER OVERRULING
PETITIONER'S OBJECTION TO
MAGISTRATE JUDGE'S ORDER
DENYING MOTION FOR
AMENDMENT OF DISCOVERY**

[Dkt. No. 46]

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17 **I. INTRODUCTION**

18 Petitioner, Darryl Dunsmore ("Petitioner"), proceeding pro se, filed a Petition
19 for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner filed an
20 objection in response to the Magistrate Judge's previous order denying his motion
21 to amend his discovery request. (Dkt. No. 43.) For the reasons stated below, the
22 Court OVERRULES Petitioner's Objection to the Magistrate Judge's Order
23 Denying Motion for Amendment of Discovery.

24 **II. PROCEDURAL HISTORY**

25 On November 7, 2013, Petitioner filed a Motion for Discovery pursuant to
26 Rules 6 and 7 of the Rules Governing Section 2254 and 2255 Cases. (Dkt. No. 30.)
27 Petitioner asserted that discovery was "necessary for good cause to support [his]
28 factual allegations." (Dkt. No. 30 at 2.) Petitioner also sought to expand the record

1 in his state court case to bring forth exculpatory evidence which supported his
2 claims of prosecutorial misconduct, perjury, and bias. (Dkt. No. 30 at 2.)

3 On November 14, 2013, the Honorable Peter C. Lewis, United States
4 Magistrate Judge (“Magistrate Judge”) denied Petitioner’s motion for discovery
5 because he failed to state a specific allegation that, if fully developed, would entitle
6 him to relief under Rule 6.¹ (Dkt. No. 33 at 2.) The Magistrate Judge also denied
7 Petitioner’s request to expand the record pursuant to Rule 7 because he did not
8 demonstrate in his moving papers, that he was diligent in attempting to present these
9 additional documents in state court. (Dkt. No. 33 at 2.)

10 In response, on December 5, 2013, Petitioner filed a Motion for Amendment
11 of Discovery. (Dkt. No. 42.) In his motion, Petitioner sought to introduce
12 additional documents supporting his contention that he was diligent in attempting to
13 present these materials to the state court. (Dkt. No. 42 at 2.) On December 10,
14 2013, the Magistrate Judge issued an order denying the Petitioner’s Motion for
15 Amendment of Discovery. (Dkt. No. 43.) On December 20, 2013, Petitioner filed
16 an objection to the Magistrate Judge’s order filed on December 10, 2013.

17 III. STANDARD OF REVIEW

18 Under Federal Rule of Civil Procedure 72(a), aggrieved parties may file
19 objections to the rulings of a magistrate judge in non-dispositive matters within ten
20 days. In reviewing a magistrate judge’s order, the district judge “must consider
21 timely objections and modify or set aside any part of the order that is clearly
22 erroneous or is contrary to law.” Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A);
23 see also United States v. Raddatz, 447 U.S. 667, 673 (1980); Osband v. Woodford,
24 290 F.3d 1036, 1041 (9th Cir. 2002). Consequently, discretionary orders, such as

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26 ¹ Under Rule 6(a), “a judge may, for *good cause*, authorize a party to conduct discovery under
27 the Federal Rules of Civil Procedure.” 28 U.S.C. § 2254 Rule 6(a) (emphasis added). A habeas
28 petitioner demonstrates “good cause” within the meaning of Rule 6(a) when he or she states specific
allegations that, if the facts are fully developed, would establish that he is entitled to relief. Bracy v.
Gramley, 520 U.S. 899, 908-09 (1997) (citing Harris v. Nelson, 394 U.S. 286, 300 (1969)).

1 those denying discovery, “will be overturned only if the district court is left with the
2 definite and firm conviction that a mistake has been made.” Ctr. for Biological
3 Diversity v. Fed. Highway Admin., 290 F. Supp. 2d 1175, 1199–1200 (S.D. Cal.
4 2003) (quoting Weeks v. Samsung Heavy Indus. Co., 126 F.3d 926, 943 (7th Cir.
5 1997)).

6 IV. DISCUSSION

7 According to Rule 7(a) of the Rules Governing § 2254 and § 2255 Cases, a
8 “judge may direct the parties to expand the record by submitting additional
9 materials relating to the petition.” 28 U.S.C. § 2254 Rule 7(a). The record can be
10 expanded to introduce new evidence, without an evidentiary hearing, only if the
11 petitioner “was not at fault in failing to develop that evidence in state court.”
12 Holland v. Jackson, 542 U.S. 649, 652–53 (2004). Therefore, Rule 7 precludes a
13 habeas petitioner from submitting new evidence unless he or she can demonstrate
14 due diligence in attempting to present these materials at the state court level. Id. at
15 653; see Williams v. Taylor, 529 U.S. 420, 440 (2000) (finding that habeas
16 petitioner was barred under diligence provision of § 2254(e)(2) from presenting a
17 psychiatric report because his counsel, who had notice of the report’s existence,
18 failed to obtain it).

19 In this instance, the Magistrate Judge denied Petitioner’s request to expand
20 the record under Rule 7. In his objection, Petitioner submits additional documents
21 which purportedly demonstrate his diligence in procuring the requested discovery
22 items: (1) a declaration offer of proof by Petitioner to Superior Court; (2) a
23 declaration offer of proof by Petitioner to the California Court of Appeal, Fourth
24 Appellate District; (3) a declaration from Petitioner’s mother stating her attempts to
25 obtain the victim, Joe Camacho’s, medical records; (4) Petitioner’s discovery
26 request in a separate suit against the court official involved in his conviction; (5)
27 Petitioner’s “Motion to Compel” seeking discovery as part of a separate lawsuit
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1 against his former attorney, Lee Plummer; and (6) materials and correspondence
2 relating to his appeal.

3 These documents, however, do not establish that Petitioner made a diligent
4 effort to introduce his requested discovery at the state level. Rather, they reveal the
5 Petitioner's numerous attempts, in pursuing post-conviction relief, to obtain any and
6 all materials and evidence relating to his state court proceeding.


7 After review of the Petitioner's proffered evidence, the Court finds them
8 insufficient to demonstrate his compliance with Rule 7's diligence requirement.
9 Therefore, the Magistrate Judge's denial of Petitioner's Motion for Amendment of
10 Discovery was not clearly erroneous.

11 **V. CONCLUSION**

12 IT IS HEREBY ORDERED that the Court OVERRULES Petitioner's
13 Objection to the Magistrate Judge's Order Denying Motion for Amendment of
14 Discovery.

15 IT IS SO ORDERED.

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17 DATED: January 29, 2014

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19 HON. GONZALO P. CURIEL
20 United States District Judge
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